

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 10, 2000

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REGULATORY AUTH.

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OFFICE OF THE
EXECUTIVE SECRETARY

IN RE:

GENERIC DOCKET TO ESTABLISH UNE PRICES)
FOR LINE SHARING PER FCC 99-355, AND RISER)
CABLE AND TERMINATING WIRE AS ORDERED)
IN TRA DOCKET 98-00123)

DOCKET NO.
00-00544

**ORDER OF PRE-HEARING OFFICER GRANTING PETITIONS FOR LEAVE TO
INTERVENE, MOTIONS TO EXPAND THE DOCKET, MOTION FOR INTERIM
RELIEF, MOTION TO ESTABLISH A PROCEDURAL SCHEDULE, AND
MOTION TO EXTEND DEADLINE TO FILE REPLY COMMENTS**

These matters came before the Pre-Hearing Officer at a properly noticed Pre-Hearing Conference on August 3, 2000. The purpose of the Pre-Hearing Conference was to hear comments from the parties on the motion to expand the docket and to dispose of all outstanding motions and petitions.

Numerous parties sought to intervene in this docket. Time Warner Telecom of the Mid-South, L.P. ("Time Warner") filed a Petition for Leave to Intervene on June 27, 2000. Petitions for Leave to Intervene were filed on June 30, 2000 by United Telephone-Southeast, Inc. ("United"), Sprint Communications Company, L.P. ("Sprint"), AT&T Communications of the South Central States, Inc. ("AT&T"), TCG MidSouth, Inc. ("TCG"), Telephone Data System Companies ("TDS"),¹ Rhythm Links, Inc., MCI Telecommunications d/b/a MCI WorldCom ("MCI"), BellSouth Telecommunications, Inc.

¹ TDS includes Tennessee Telephone Co., Humphreys County Telephone Co., Concord Telephone Exchange, Inc., and Tellico Telephone Co.

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("BellSouth"), NEXTLINK Tennessee, Inc. ("NEXTLINK"), BlueStar Networks, Inc. ("BlueStar"), and DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"). Finally, Broadslate Networks of Tennessee, Inc. ("Broadslate") and Network Telephone Corporation ("Network Telephone") filed the most recent Petitions for Leave to Intervene on July 14, 2000.

On July 11, 2000, BlueStar and Covad filed a *Motion to Expand Docket No. 00-00544 to Set Rates for Unbundled Copper Loops (UCLs), Loop Conditioning and Access to Loop Make-Up Information*. The Motion to Expand requested that the Pre-Hearing Officer set both permanent and interim rates. On that same day, BlueStar, Covad, AT&T, TCG, and NEXTLINK filed a *Motion to Establish a Procedural Schedule and Motion to Extend the Deadline for Filing Reply Comments*. Broadslate and Network Telephone filed comments in support of the motion to expand this docket on July 14, 2000.

The parties in attendance at the August 3, 2000 Pre-Hearing Conference were:

Time Warner Telecom of the Mid-South, L.P. – **Charles B. Welch, Jr.**, Esquire, Farris, Mathews, Branan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219;

AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. – **James P. Lamoreux**, Esquire, 1200 Peachtree Street, N.E., Room 4060, Atlanta, GA 30309;

NEXTLINK Tennessee, Inc. – **Dana Shaffer**, Esquire, 105 Molloy Street, Suite 300, Nashville, TN 37201 and **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

MCI Telecommunications d/b/a MCI WorldCom – **Susan Berlin**, Esquire, 6 Concourse Parkway, Atlanta, GA 30328;

Broadslate Networks of Tennessee, Inc. and Network Telephone Corporation – **Marc B. Rothschild**, Esquire, Swidler, Berlin, Shereff, Friedman, LLP, 3000 K Street, NW, Suite 300, Washington, D.C. 20007-5116;

BlueStar Networks, Inc. – **Michael Bressman**, Esquire, Five Corporate Centre, 801 Crescent Centre Drive, Suite 600, Franklin, TN 37067 and **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

DIECA Communications, Inc. d/b/a Covad Communications Company. – **Catherine F. Boone**, Esquire, 10 Glenlake Parkway, Suite 650, Atlanta, Georgia 30328 and **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

BellSouth Telecommunications, Inc. – **Guy M. Hicks**, Esquire, 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300 and **Bennett Ross**, Esquire, 675 W. Peachtree Street, Suite 4300, Atlanta, GA 30375, who participated telephonically;

Telephone Data System Companies – **Dale Grimes**, Esquire, Bass, Berry & Sims PLC, 2700 First American Center, Nashville, TN 37238; and

United Telephone Southeast, Inc. and Sprint Communications Company, L.P. – **James B. Wright**, Esquire, 14111 Capital Boulevard, Wake Forest, North Carolina 27587-5900.

During the Conference, the Pre-Hearing Officer addressed all outstanding motions and petitions. First the Pre-Hearing Officer asked if there were any objections to the petitions for leave to intervene. There were none.

Next, the Pre-Hearing Officer requested comments from the parties on the motion to expand the docket. Time Warner and MCI did not object to the motion, and TDS offered no comment. Sprint and United did not object to expanding the docket to include rates for loop conditioning and access to loop make-up information, but did object to expanding the docket to include rates for UCLs. Sprint and United argued that the inclusion of rates for UCLs would greatly delay and change the nature of this docket.

BellSouth did not object to the expansion. Instead, BellSouth argued that if the Pre-Hearing Officer were to grant the motion to expand, then the Pre-Hearing Officer should also expand the docket to include all elements listed in the FCC's *UNE Remand*

Order.² In addition, BellSouth represented that it would be difficult for it to file supplemental cost studies before October 1, 2000.

BlueStar and Covad objected to expanding the docket to include all elements in the *UNE Remand Order* and renewed their request that the Pre-Hearing Officer order the payment of interim rates if BellSouth's cost studies were not due until October 1, 2000. Finally, the Pre-Hearing Officer proposed a procedural schedule that the parties agreed to follow. Thereafter, the Pre-Hearing Officer made the following findings:

1. There are no objections to any of the petitions for leave to intervene.
2. The petitions for leave to intervene were properly filed and meet the requirements of Tenn. Code. Ann. § 4-5-310.
2. There is a need to set permanent, cost-based rates for Line Conditioning, Access to Line Make-Up Information, UCLs, and those elements contained in the *UNE Remand Order* that are the subject of on-going arbitrations. Setting these rates will foster competition in Tennessee.
3. Although the expansion of the docket will cause delay, the adoption of interim rates should help to alleviate the negative impact of such delay.
4. Tenn. Code Ann. § 65-4-104 states: "The authority has general supervisory and regulatory power, jurisdiction and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." The power to set interim rates is necessary to carrying out the General Assembly's telecommunications services policy set

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 36 96 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Proposed Rule Making) (hereinafter *UNE Remand Order*).

forth in Tenn. Code Ann. § 65-4-123. Moreover, Tenn. Code Ann. § 65-5-201 grants the Authority power to fix rates after a hearing. By implication, this section grants the Authority power to set interim rates until final rates can be determined.

5. The parties do not dispute that a property interest is affected and that, therefore, certain due process must be afforded the parties. The Tennessee Supreme Court has stated:

A fundamental requirement of due process is notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *In Re Riggs*, 612 S.W.2d 461, 465 (Tenn. App. 1980). The purpose of notice is to allow the affected party to marshal a case against the firing body. *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976).

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In determining what process is due in a particular situation, three factors must be considered: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Moreover, the component parts of the process are designed to reach a substantively correct result. Elaborate procedures at one stage may compensate for deficiencies at other stages. *Bignall*, 538 F.2d at 246.

Phillips v. State Bd. of Regents of the State Univ. and Community College Sys., 863 S.W.2d 45, 50 (Tenn. 1993). It is the conclusion of the Pre-Hearing Officer that all parties’ due process interests are protected for the purpose of setting interim rates as long as all parties are provided an opportunity to assert their position, provide evidentiary support, and respond to any opposing positions. To require a full-blown hearing at the interim rate phase would defeat the purpose of setting interim rates. Further, subject to the

parties' agreement, attaching a true-up provisions to the interim rates should mitigate any parties' concerns about financial harm.

6. The parties agreed to the following schedule for the resolution of this docket:

- Interim Rate Proposals with supporting evidence and/or documentation shall be filed with the Authority and served on all parties no later than **3:00 p.m., Friday, August 18, 2000.**
- Reply to Interim Rate Proposals with supporting evidence and/or documentation shall be filed with the Authority and served on all parties no later than **3:00 p.m., Friday, August 25, 2000.**
- Supplemental Cost Studies including a summary and supporting documentation shall be filed with the Authority and served on all parties no later than **3:00 p.m., Monday, October 2, 2000.**
- Discovery requests shall be filed with the Authority and served on all parties no later than **4:30 p.m., Friday, October 13, 2000.** All Discovery Requests shall be served by hand-delivery or facsimile on the date of filing.
- Responses to Discovery shall be filed with the Authority and served on all parties on or before the tenth (10th) day following the filing of the Discovery Requests.
- Pre-filed Direct Testimony shall be filed with the Authority and served on all parties no later than **12:00 p.m., Friday, November 10, 2000.**
- Rebuttal to Pre-filed Direct Testimony shall be filed with the Authority and served on all parties no later than **2:00 p.m., Friday, November 17, 2000.**
- The Hearing shall be held from **Monday, November 27, 2000 through Friday, December 1, 2000**, if necessary.

IT IS THEREFORE ORDERED THAT:

1. The Petitions for Leave to Intervene filed by Time Warner Telecom of the Mid-South, L.P., United Telephone-Southeast, Inc., Sprint Communications Company, L.P., AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., Telephone Data System Companies ("TDS"), Rhythm Links, Inc., MCI Telecommunications d/b/a MCI WorldCom, BellSouth Telecommunications, Inc., NEXTLINK Tennessee, Inc., BlueStar Networks, Inc., and DIECA Communications, Inc.

d/b/a Covad Communications Company, Broadslate Networks of Tennessee, Inc., and Network Telephone Corporation are granted. The parties may participate in the proceeding as their interest may appear and receive copies of any notices, orders or other documents herein.

2. The Motion to Expand Docket No. 00-00544 to Set Rates for Unbundled Copper Loops (UCLs), Loop Conditioning and Access to Loop Make-Up filed by BlueStar Networks, Inc. and DIECA Communications, Inc. d/b/a Covad Communications Company is granted.

3. The oral motion of BellSouth Telecommunications, Inc. to expand the Docket to include setting rates for elements listed in the FCC's *UNE Remand Order* is granted in part such that those specific elements related to costs and rates that are the subject of dispute in an on-going arbitration shall be addressed in this Docket.

4. The motion of DIECA Communications, Inc. d/b/a Covad Communications Company to set interim rates is granted. The Pre-Hearing Officer shall set such rates after allowing each party to present its position and respond to opposing positions.

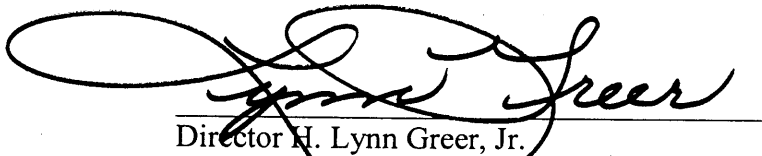
5. The Motion to Establish a Procedural Schedule filed by BlueStar Networks, Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., and NEXTLINK Tennessee, Inc. is granted. The procedural schedule agreed to by the parties and set out above is hereby adopted.

6. The Motion to Extend the Deadline for Filing Reply Comments filed by BlueStar Networks, Inc., DIECA Communications, Inc. d/b/a Covad Communications

Company, AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., and NEXTLINK Tennessee, Inc. is denied as moot.

7. Any party aggrieved by this Order may file a Petition for Reconsideration pursuant to Tenn. Code Ann. § 4-5-317 with the Tennessee Regulatory Authority within ten (15) days of the entry of this Order.

8. Any party aggrieved by this Order may file a Petition for Appeal pursuant to Tenn. Code Ann. § 4-5-315 with the Tennessee Regulatory Authority within ten (10) days of the entry of this Order.



Director H. Lynn Greer, Jr.
Pre-Hearing Officer

ATTEST:



K. David Waddell, Executive Secretary